# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 9, 2010 |
| v | No. 288143<br>Wayne Circuit Court |
| JIM THEODORE RUCINSKI,<br><br>Defendant-Appellant. | LC No. 07-023198-FH |

Before: Hoekstra, P.J., and Stephens and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of manufacture of a controlled substance—marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to five years' probation for the manufacture of marijuana conviction and two years in prison for the felony-firearm conviction. Because we conclude that there were no errors warranting relief, we affirm.

## I. Basic Facts

Officer Burke Lange testified that in August 2007 he was working in defendant's neighborhood when he received a radio call from another officer about a suspect who was fleeing on foot. Lange responded to the call and met with the officer. The officer described the suspect and indicated which direction he fled. Lange proceeded through backyards in search of the suspect. While doing this, Lange came across a six-foot wooden fence, which he could not see over. Lange climbed the fence to see if the suspect was hiding behind it. After jumping on the fence and looking into the yard below, Lange saw marijuana growing in the backyard.

Lange went to the front of the house where he encountered defendant. He asked defendant if he was the homeowner and defendant responded that he was. Lange then asked defendant if he knew that there was marijuana growing in his backyard. According to Lange, defendant responded that he knew about the marijuana and was growing it for himself and a friend. He then asked defendant if he could search his home and defendant consented to the search. Lange waited for two other officers to arrive before he searched defendant's home.

The three officers first searched the backyard. Lange testified that there were over thirty marijuana plants growing in defendant's backyard. The state forensic lab tested eleven plants

and confirmed that they were marijuana. The officers then searched the detached garage. In the garage, the officers found a bag of marijuana, sandwich bags, a triple beam scale, a vial containing marijuana seeds, and a vial containing marijuana. They next searched the residence. Just inside the backdoor, on top of a washer or dryer, Lange found a loaded handgun. Lange continued to search the house and found more handguns and rifles in the closet of defendant's bedroom. All the guns were registered to defendant.

The prosecution eventually charged defendant as noted above and the jury found defendant guilty.

## II. Erroneous Admission of Suppressed Statements

### A. Standard of Review

We shall first address defendant's argument that the trial court erred when it permitted officer Lange to testify about a statement that defendant made at the time of his arrest. Specifically, defendant argues that the trial court erred when it permitted Lange to testify about statements that defendant made after he was in custody in contravention of its earlier order of suppression.

This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). However, it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id.* To the extent that this issue involves determining the scope of the trial court's order suppressing defendant's statements, this Court reviews the proper interpretation of a court order de novo. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008).

### B. Procedural History

Before trial, defendant moved to have the statements he made to the officers on the day of his arrest suppressed. In his motion to suppress, defendant argued that Lange took him into custody the moment he admitted to being the owner of the home. Further, because Lange failed to advise him of his right to remain silent, defendant argued that the statements he made thereafter could not be admitted against him.

At the hearing concerning defendant's motion to suppress, defendant testified that Lange approached him and asked whether he owned the home. Defendant said that he told Lange that he did own the home, after which Lange reached for his arms and placed him in handcuffs. Defendant stated that, as Lange reached for him and placed him in handcuffs, Lange asked whether he knew about the marijuana in the backyard. Defendant said that he admitted that he owned the marijuana. Lange disagreed with defendant's version of events and testified that he did not place defendant into custody until after he and the other officers searched the backyard.

After hearing the evidence, the trial court found that Lange began to place defendant in custody simultaneously with the question and answer regarding whether defendant knew about the marijuana. For that reason, the trial court suppressed any statement that defendant might have made after the answer to Lange's question regarding whether defendant knew about the marijuana. The trial court issued an opinion and order granting in part the motion to suppress

defendant's statements to the officers. Specifically, the trial court ordered the suppression of "any statements which were made by the defendant subsequent to the defendant's initial admission that he knew of the marijuana growing in his backyard . . . ."

At trial, the prosecutor requested clarification concerning the proper scope of Lange's testimony regarding defendant's admission that he knew about the marijuana in the backyard. The prosecutor said that Lange would testify that, after he asked defendant about whether he knew about the marijuana in his backyard, defendant responded yes and said he was growing it for himself and a friend. The prosecutor argued that, because the trial court already determined that defendant was not yet in custody when he answered Lange's question about whether he knew about the marijuana in his backyard, Lange should be permitted to testify about defendant's complete answer. Defendant's trial counsel disagreed and argued that the trial court's order suppressing defendant's statements applied to all statements made after defendant acknowledged that he knew about the marijuana. After hearing the arguments, the trial court clarified that its order of suppression applied to only those statements that defendant made after his answer to Lange's question concerning whether defendant knew about the marijuana. The trial court stated that his order did not limit Lange from testifying about the full answer given by defendant. For that reason, the trial court indicated that Lange would be permitted to testify that defendant responded that he knew about the marijuana and was growing it for himself and a friend.

C. Analysis

"A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966) and *People v Daoud*, 462 Mich 621, 632-639; 614 NW2d 152 (2000). In this case, the trial court determined that Lange did not place defendant in custody until after he asked defendant whether he knew about the marijuana in his backyard. For that reason, the trial court determined that defendant was not entitled to be advised of his rights before Lange asked that question. See *Daoud*, 462 Mich at 632-633 (noting that a defendant must be advised of his rights before being subjected to custodial interrogation). Moreover, the trial court determined that, because there "was no obligation on the part of the police at that juncture to have given the Miranda warnings to [defendant] before that affirmative answer," defendant's admission that he knew the marijuana was growing in his backyard was admissible.

On appeal, defendant has not challenged these determinations. Rather, he argues that the trial court erred when it later permitted Lange to testify that defendant not only acknowledged that he knew about the marijuana, but also volunteered that he was growing it for himself and a friend. Defendant argues that this decision was contrary to the trial court's order of suppression because defendant's statement that he was growing it for himself and a friend came after the point where the trial court had determined that Lange took defendant into custody. We do not agree that the trial court's decision to permit Lange to testify about the latter statement contravened its earlier order of suppression.

At the suppression hearing, defendant asked the trial court to suppress all the statements he made on the day of his arrest after he acknowledged being the homeowner because he was

taken into custody immediately after answering that question. The trial court agreed that Lange took defendant into custody shortly after he began to speak with defendant, but determined that any custodial interrogation occurred after Lange asked defendant whether he knew about the marijuana growing in his backyard. For that reason, the trial court suppressed every statement that defendant made after acknowledging the existence of the marijuana, but specifically permitted Lange to testify that defendant admitted to knowing about the marijuana. However, neither defendant nor the prosecution presented evidence about the specific content of defendant's acknowledgment or otherwise asked the trial court to decide whether and to what extent the order might limit Lange's ability to testify about the exact wording used by defendant when he answered Lange's question. That issue did not arise until trial; and, as noted above, the trial court determined that Lange could testify about the actual words used by defendant consistent with the order of suppression.

We conclude that the trial court properly determined that its earlier order of suppression did not preclude Lange from testifying about the exact wording of defendant's acknowledgement. Although the trial court referred to defendant's admission in its ruling, it is clear from the context that the trial court's earlier order suppressing defendant's statements applied to every statement that defendant made *after* he answered Lange's question concerning whether defendant knew about the marijuana. That is, because defendant was not entitled to be advised of his *Miranda* rights until after he answered Lange's question regarding whether he knew about the marijuana, the order did not apply to that answer. Accordingly, to the extent that this statement included an admission that was broader than mere knowledge that the marijuana was growing in his backyard, that statement was nevertheless admissible under the trial court's earlier order.

The trial court did not err when it permitted Lange to testify about the exact wording of defendant's answer to the question concerning whether he knew about the marijuana.

## III. Sufficiency of the Evidence

### A. Standard of Review

Defendant next argues that there was insufficient evidence to support his convictions. This Court reviews de novo challenges to the sufficiency of the evidence. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). This Court reviews the evidence in a light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007).

### B. Manufacturing a Controlled Substance

The elements of manufacturing of a controlled substance are (1) the defendant manufactured a substance; (2) the substance manufactured was the controlled substance at issue; and (3) the defendant knowingly manufactured it. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). The manufacture of a controlled substance includes the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction from substances of natural origin, or independently by means

of chemical synthesis, or by a combination of extraction and synthesis. MCL 333.7106(2); *People v Hunter*, 201 Mich App 671, 676; 506 NW2d 611 (1993).

Defendant told the officers that he was the owner of the home where the marijuana was found and he was aware of the marijuana on his property. Defendant also told the officers that he was growing the marijuana for himself and a friend. Further, the evidence from the garage—the sandwich bags, scale, and seeds—strongly suggests that the marijuana from the backyard was being processed in defendant's garage. This evidence was sufficient to support defendant's conviction for manufacturing marijuana. Further, we do not agree that Brian Michie's testimony alters this conclusion.

Michie testified that he was the one who planted the seeds and watered the plants, but he also testified that he believed defendant had control over the plants and could do with them what he wished. Michie testified that, when defendant asked him to remove the plants, he did not do so because he thought defendant would remove them if wanted them gone. Michie also disavowed any connection to the items found in defendant's garage. Even if we were to view Michie's testimony in the light most favorable to defendant rather than the prosecution, the evidence from the garage is circumstantial evidence that someone other than Michie processed the marijuana plants, and the jury could reasonably have inferred that the other person was defendant. See *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (2006). (noting that circumstantial evidence and the reasonable inferences drawn from the evidence are sufficient to prove the elements of a crime). Accordingly, even if the jury had concluded that Michie planted and tended the seeds, it could nevertheless still conclude that defendant had joint control over the plants and processed them in the garage.

Defendant also contends that there was no evidence that the substances found in his garage were marijuana. Specifically, defendant argues that Lange's testimony could not be a replacement for expert testimony concerning whether the substances found in the garage were marijuana because Lange was not qualified to be an expert.

Police officers may testify about their opinions under MRE 701 if the opinions are not dependant on scientific, technical or specialized knowledge. *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988). Under MRE 701, lay witnesses may testify about their opinions and inferences so long as 1) the opinions and inferences are rationally based on the perception of the witness and 2) the opinions and inferences are either helpful in understanding the witness's testimony or in determination of fact. MRE 701. In contrast, MRE 702 governs the admissibility of expert testimony. Under this rule, expert evidence is admissible if it complies with a three-part test. *People v Beckley*, 434 Mich 691, 711; 456 NW2d 391 (1990). First, the expert must be qualified. Second, the evidence must provide the trier of fact a better understanding of the evidence or assist in determining a fact in issue. Finally, the evidence must be from a recognized discipline. *Id.*

In *People v Williams*, 198 Mich App 537, 542; 499 NW2d 404 (1993), this Court held that a police officer who testified that evidence found in the defendant's house was routinely used to cut, weigh, package, and sell controlled substances was an expert within the meaning of MRE 702. Drug related enforcement, this Court held, is a "recognized area of expertise." *Id*.

In this case, Lange was examined outside the presence of the jury to see if he could give evidence regarding the nature of the substances found in the garage. He testified that he had seen marijuana seeds on 100 or more occasions while executing search warrants. He had seen the seeds at marijuana growing operations, in people's cars, and on their persons. He also testified that he had taken a class on marijuana seeds as part of his job. The trial court found that Lange could testify about his opinion regarding the substances but could not "testify insofar as the substance specifically being a particular item."

We note that the prosecution did not have to prove that the substances found in the garage were a controlled substance in order to convict defendant. The marijuana in the garage does not form the basis for defendant's conviction—the marijuana in defendant's yard goes to the manufacturing charge. Defendant stipulated to the fact that eleven plants found in his yard and tested by the Michigan State Laboratory were marijuana. The marijuana and paraphernalia found in the garage are circumstantial evidence that the plants were processed. And there was adequate circumstantial evidence to permit the jury to consider whether the substances found there were marijuana.

Lange testified that there was a bag of dried marijuana, a vial of seeds, a box of Baggies and a scale in defendant's garage and that this evidence often used to manufacture marijuana. Moreover, Lange was qualified to testify as an expert. Lange has had significant experience in law enforcement; he has executed over 100 search warrants related to marijuana possession and delivery. He has found marijuana paraphernalia in growing operations, in cars, and on persons. Moreover, drug enforcement is not in the general knowledge of a layperson and can form the basis for expert testimony. As an expert, Lange's testimony that the substances found in the garage were marijuana and were part of defendant's manufacturing of the marijuana helped the trier of fact ultimately decide the issue. Viewed in the light most favorable to the prosecution, there was sufficient evidence to support defendant's conviction for manufacturing marijuana.

### C. Felony Firearm

Defendant also argues that there was insufficient evidence to convict him of felony-firearm. The elements of felony-firearm are that the defendant possessed a firearm during the commission of a felony. *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). As there was sufficient evidence to convict defendant of manufacturing marijuana and numerous guns were found in his home, there was sufficient evidence to convict defendant of felony-firearm.

## IV. Ineffective Assistance of Counsel

Finally, defendant argues that he was denied the effective assistance of counsel when his trial counsel failed to call him as a witness. Because defendant did not establish a testimonial record regarding his ineffective assistance of counsel claim, our review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Yost*, 278 Mich App at 387.

After carefully reviewing the record, we cannot conclude that defendant's trial counsel's decision not to call defendant as a witness fell below an objective standard of reasonableness under prevailing professional norms. Defendant's trial counsel provided defendant with a substantial defense, vigorously cross-examined the prosecution's witnesses, and argued on defendant's behalf. Therefore, defendant's trial counsel could legitimately conclude, as a matter of trial strategy, that defendant's testimony was unnecessary and may even prove harmful. And this Court will not substitute its judgment for the judgment of counsel regarding matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Defendant has failed to overcome the presumption that he had the effective assistance of counsel. See *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

There were no errors warranting relief.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly